

M63VSHET

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

20 Cr. 412 (AT)

5 TIMOTHY SHEA,

6 Defendant.

Trial

7 -----x
8 June 3, 2022
9 11:00 a.m.

10 Before:

11 HON. ANALISA TORRES,

12 District Judge
13 and a Jury

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
Southern District of New York

17 BY: NICOLAS T. ROOS

ROBERT B. SOBELMAN

18 Assistant United States Attorneys

19 MERINGOLO & ASSOCIATES P.C.

Attorneys for Defendant

20 BY: JOHN C. MERINGOLO

ANGELICA B. CAPPELLINO

21 CLARA S. KALHOUS

22
23 Also Present: Sunny Drescher, Paralegal Specialist, USAO
24
25

M63VSHET

(Trial resumed; jury not present)

THE COURT: Good morning.

Please make your appearances.

MR. SOBELMAN: Robert Sobelman and Nicolas Roos for the United States. We're joined by Sunny Drescher, a paralegal in our office. Good morning, your Honor.

MR. MERINGOLO: Good morning, your Honor.

John Meringolo, Anjelica Cappellino, and Clara Kalhous for Timothy Shea, who's to my right.

THE COURT: Please be seated.

I have another note from the jury. I received it at 10:42. It states: We the jury request printout of all bank statements from 2018 to 2020. This format will be easier than on the TV screen.

It's signed by the foreperson and dated with today's date.

MR. ROOS: Okay. That's going to take a little bit; pretty voluminous, but we'll get right to work on it.

THE COURT: Okay. Thank you.

MR. ROOS: I'm sorry, your Honor, the date range again?

THE COURT: It says 2018 to 2020.

MR. ROOS: Okay.

THE COURT: I've made that Court Exhibit No. 4.

(Recess pending verdict)

M63VSHET

1 THE COURT: Please be seated.

2 I've received another note from the jury; came in at
3 12:10. I'm making it Court Exhibit No. 5.

4 It states: We the jury request clarification from
5 judge. Re: Regarding falsification of documents charge. If
6 there exists a signed document on laptop that makes an
7 agreement between Tim Shea and Brian Kolfage regarding purchase
8 of email list for \$150,000 entered in March 2019.

9 Now in October 2019, Tim Shea and Brian Kolfage simply
10 memorialized the agreement, quote, again – it seems to me an
11 end quote – because they do not have access to the original
12 agreement. Is it still a crime they created this document in
13 October 2019 and signed it and dated it as March 2019?

14 Is it a crime?

15 Or is it a crime they created the document in October
16 2019 and signed and dated it and made it look like it was
17 signed in March 2019?

18 Irrespective, whether or not another document existed
19 in March 2019 somewhere, the prosecution did not seek and find.

20 It's signed by the foreperson and dated with today's
21 date.

22 So I'm going to hand this down to you so that you can
23 review it and let me know how you'd like me to respond.

24 MR. SOBELMAN: Thank you, your Honor.

25 THE COURT: In the meantime, I understand that the

M63VSHET

1 Xeroxing is underway. You're gathering the documents that they
2 requested. I think that because it's been a long time, that I
3 should bring them in and just let them know that the documents
4 are voluminous, and that's the reason that it's taking awhile.
5 I can also read out the second note or I can wait until you've
6 reviewed this note and then bring them in.

7 MR. SOBELMAN: Your Honor, we've completed printing
8 about half the bank records; they're with defense counsel. I'm
9 hopeful their review is almost complete and we can send those
10 back. The other half we're printing now on three different
11 printers at the same time.

12 I think we would propose waiting a few minutes to let
13 us confer about this note and maybe we can even get them some
14 of the bank records in the meantime before they come out.

15 THE COURT: Okay.

16 MR. SOBELMAN: Thank you, your Honor.

17 May we step out for a few moments?

18 THE COURT: You may.

19 MR. SOBELMAN: Thank you.

20 (Pause)

21 THE COURT: Are you ready?

22 MR. SOBELMAN: Yes, your Honor.

23 THE COURT: It looks like Mr. Roos is not here.

24 MR. SOBELMAN: Mr. Roos had another matter he has to
25 tend to. This is Daniel Elsen-Rooney. He's an intern in our

M63VSHET

1 office.

2 THE COURT: All righty. Go ahead.

3 MR. SOBELMAN: Your Honor, let's wait for
4 Mr. Meringolo.

5 THE COURT: Oh, I'm sorry. I thought he was there.

6 MR. SOBELMAN: That's okay.

7 THE COURT: All righty.

8 I'll hear from the government.

9 MR. SOBELMAN: Yes, your Honor.

10 After considering the note, we have the following
11 suggestion for how to respond:

12 We take it there are basically three points here. As
13 to the first, which we read as a factual question, we would
14 suggest that the Court offer, if the jury wishes, to provide a
15 copy of the transcript of Andrew Crain's testimony, which I
16 think would answer that question.

17 THE COURT: All right. So let's just go over what the
18 first item is.

19 MR. SOBELMAN: Yes, your Honor.

20 THE COURT: If there exists a signed document on
21 laptop that makes an agreement between Tim Shea and Brian
22 Kolfage regarding purchase of email list for 150,000 entered in
23 March 2019. I don't know what the question is. How do you
24 interpret that?

25 MR. SOBELMAN: We agree it's not clear. But to us it

M63VSHET

1 seems like a factual question about whether there was or is
2 such a document on that laptop. We think that to the extent
3 the record has information relevant to answer that question,
4 it's found in the testimony of Andrew Crain.

5 THE COURT: What did Crain say?

6 MR. SOBELMAN: Crain found no -- I believe no such
7 agreement on a laptop, but Crain's testimony also made clear
8 that we do not have access to Tim Shea's laptop, I believe. I
9 don't remember whether he said that or not, but there's no
10 evidence on what's on the defendant's laptop, for example.

11 THE COURT: So are you asking me to tell them how I
12 interpret the question?

13 MR. SOBELMAN: No, your Honor. I don't think we
14 should try to interpret the question. It's not clear.

15 It appears to us to be a factual question about what's
16 on these -- what's on a device, not clear which device. But I
17 think all I would suggest is to say to the jury with respect to
18 the first one, if it would be of assistance to the jury, we can
19 provide you a copy of the transcript of the testimony of Andrew
20 Crain and sort of leave it there. If they don't want it, that
21 would be fine; they are not asking for it, but it might be of
22 assistance to them. There's not other evidence in the record
23 that would bear on whatever factual question is being asked
24 there.

25 THE COURT: One moment.

M63VSHET

1 I don't know whether this is a freestanding question
2 or whether it is part of the question. In other words, asking
3 us to assume there exists a signed document, and then now in
4 October 2019, and then is it a crime. I think that's one way
5 of interpreting it.

6 MR. SOBELMAN: There's no evidence that a document
7 existed back in March 2019 on a laptop or otherwise. So that's
8 why I read it as a question.

9 But I agree with your Honor that it certainly could be
10 read multiple ways. But that's why I think offering the jury
11 the testimony, if they want it. And if it's not a factual
12 question and it's a hypothetical, then I assume they'll decline
13 that invitation.

14 THE COURT: Well, are you suggesting that I ask them
15 to clarify whether it's a factual question or whether it's a
16 hypothetical? Are they asking me to assume something?

17 MR. SOBELMAN: I think we'd like to avoid a lengthy
18 back-and-forth with the jury, but we don't have an objection if
19 your Honor wants to clarify what's written.

20 Perhaps I could explain our thinking on the second and
21 third points, that may be informative.

22 THE COURT: Okay.

23 MR. SOBELMAN: With respect to the second point, it
24 appears to ask, sort of, in two circumstances whether that
25 would constitute a crime under Count Three.

M63VSHET

1 We would request that the Court simply direct the jury
2 to the jury instructions for Count Three and make clear that
3 those are the elements. If they find the elements are met,
4 it's a crime. If they don't find the elements are met, it's
5 not a crime. I don't think either hypothetical is able to be
6 answered with a yes or no.

7 THE COURT: Are you suggesting that I reread the
8 instructions or simply direct them to where the instructions
9 are in the jury charge?

10 MR. SOBELMAN: We defer to the Court on that.

11 But they do have a copy of the charge with them and
12 I'm sure are able to read it themselves. But if the Court
13 thinks it would be helpful for the jury to reread it, we
14 certainly would have no objection.

15 THE COURT: Okay. Go ahead.

16 MR. SOBELMAN: With respect to the last point that
17 begins "Irrespective," we would suggest that, similarly to the
18 first point, the Court offer Andrew Crain's testimony to the
19 extent it's a factual question; and that the Court also point
20 the jury to the equally available evidence instruction so that
21 that point is clear with respect to what might exist or any
22 speculation that's going on.

23 THE COURT: So when you refer to the third item, are
24 you referring to the "irrespective"?

25 MR. SOBELMAN: Yes, your Honor. I read the sort of

M63VSHET

1 middle two as one bucket, which is just requiring a pointing
2 back to the legal instructions. It appears those are two
3 different -- again, a little difficult to understand, two
4 different hypotheticals saying is this a crime if this is the
5 fact we find. And I think the facts are not complete enough in
6 order to enable the Court to answer it.

7 THE COURT: So it says whether or not another document
8 existed in March 2019 somewhere, the prosecution did not search
9 and find. Whether or not a document existed certainly goes to
10 a question of fact, but it could be also a question of fact as
11 to whether or not the prosecution searched for such a document.

12 MR. SOBELMAN: And to the extent that question is
13 answered by the record, it would be in Andrew Crain's
14 testimony, which is why we would suggest the Court offer a copy
15 of his testimony with respect to that one; and then we would
16 also suggest that the equally available evidence instruction be
17 pointed to just to make sure the jury understands that point in
18 considering this question.

19 THE COURT: Where is that instruction, equally
20 available evidence?

21 MR. SOBELMAN: It's paired with the uncalled witnesses
22 instruction.

23 THE COURT: So with respect to if there exists a
24 signed document and now in October 2019, you're recommending
25 that I direct them to the testimony of Andrew Crain? I'm not

M63VSHET

1 quite sure where it is you think that the elements of Count
2 Three come in.

3 MR. SOBELMAN: So, your Honor, if we look at it as, I
4 guess, four bullet points or four dash lines, the first
5 being -- starting "If there exists"; second, "Now in October";
6 third, "Or is it a crime"; fourth, "Irrespective," with respect
7 to bullets one and four, we think Mr. Crain's testimony might
8 be relevant to answering their inquiry. And with respect to
9 bullets two and three, we think the Court should direct them to
10 the Court's instructions on Count Three. And then with respect
11 to bullet four, we ask the Court also direct their attention to
12 the equally available evidence instruction.

13 THE COURT: With respect to one, you're asking me to
14 direct them to Crain's testimony, also with respect to number
15 four; and also that I refer them with respect to number four to
16 the equally available testimony; and with respect to two and
17 three to the elements of the crime.

18 MR. SOBELMAN: Yes, your Honor. Whether your Honor
19 wants to direct them to testimony or simply offer that we could
20 send in the testimony, we defer to the Court. I think either
21 way would be appropriate.

22 THE COURT: Mr. Meringolo?

23 MR. MERINGOLO: Judge, I'd have to object to any
24 testimony going back into the jury room that they didn't
25 request. I think your Honor should just direct them to the

M63VSHET

1 jury instructions.

2 And we would also at this point object to the Court,
3 with the equal available evidence, because in this particular
4 case, I guess there were laptops seized that the government
5 didn't go in. And there are, I believe -- it may have been
6 Mr. Crain actually that says that there were 40 -- or 30 or 40
7 devices that he went through.

8 But I don't think it's proper to send any testimony
9 back into a jury room that the jury does not request.

10 THE COURT: Well, what I understand Mr. Sobelman to be
11 saying is that I call their attention to the fact that there
12 was testimony concerning this matter given by Mr. Crain. And
13 if they should want that, that can be sent to them.

14 MR. MERINGOLO: We would object to that for the
15 record, Judge. They know; they were here. I mean, they are
16 diligently -- this is -- they are deliberating more time than
17 the trial, the evidence was being put in. So they know
18 everything that's going on here. And I don't think we should
19 specifically direct them to specific testimony that they didn't
20 request. I think your instructions are sufficient enough on
21 the falsification.

22 MR. SOBELMAN: Your Honor, respectfully, the jury is
23 obviously working very hard. They've been at this a long time.
24 They are asking for the Court's guidance. There's not a lot of
25 guidance I think the Court can give here, but there are a

M63VSHET

1 couple of things that the Court can and should say in order to
2 assist them in trying to reach a just verdict.

3 THE COURT: All right.

4 Let's have the members of the jury brought back in.

5 (Jury present)

6 MR. SOBELMAN: Sorry, your Honor.

7 I think given the substance of the note, again, we
8 would suggest to the Court to consider whether the alternates
9 should be present or not for this particular colloquy.

10 THE COURT: I've considered that.

11 Do the parties agree that all jurors are present and
12 properly seated?

13 MR. SOBELMAN: Yes, your Honor.

14 MR. MERINGOLO: Yes, Judge.

15 THE COURT: Please be seated.

16 I've received two notes since yesterday.

17 Good afternoon. I should have started with that.

18 I received a note at 10:42, in which you say:

19 We the jury request printout of all bank statements
20 from 2018 to 2020. This format will be easier than on the TV
21 screen.

22 It's signed by the foreperson and dated today's date.

23 These documents are very voluminous and we are in the
24 process of printing them out. And we will get them to you. We
25 started immediately when we got the note, and we'll get them to

M63VSHET

1 you as soon as we can.

2 I received another note -- that note that I just
3 mentioned was Court Exhibit No. 4.

4 I received another note at 12:10 p.m., also signed by
5 the foreperson and dated with today's date. And I'm making
6 that Court Exhibit No. 5.

7 It says: We the jury request clarification from
8 judge. Re: Regarding falsification of documents charge.

9 And then there are four bullets.

10 The first bullet: If there exists a signed document
11 on laptop that makes an agreement between Tim Shea and Brian
12 Kolfage regarding purchase of email list for \$150,000 entered
13 in March 2019.

14 There was only one witness who testified as to the
15 existence of documents on devices, and that was Andrew Crain.
16 And if you should wish to read his testimony, I can offer that
17 to you.

18 And the second bullet point: Now in October 2019, Tim
19 Shea and Brian Kolfage simply memorialized the agreement again
20 because they do not have access to the original document. Is
21 it still a crime they created this document in October 2019 and
22 signed it and dated it as of March 2019? Is it a crime?

23 The third bullet point: Or is it a crime they created
24 the document in October 2019 and signed and dated it and made
25 it look like it was signed in March 2019?

M63VSHET

1 So with respect to that, I direct you to the elements
2 of the crime. And the elements of the crime appear on page 39
3 of the jury instructions, paragraph 18; and that goes through
4 page 43, 39 to 43.

5 The last bullet point: Irrespective, whether or not
6 another document existed in March 2019 somewhere, the
7 prosecution did not search and find.

8 Again, the question of what documents existed was
9 addressed in the testimony of Mr. Crain. And if you would like
10 that, I can offer that to you.

11 Also I want to call your attention to instruction
12 paragraph number 28, and that is on page 47. And it's called
13 "Uncalled Witnesses and Evidence Equally Available to Both
14 Parties."

15 And that is all I have with respect to this note.

16 So I'm going to ask you to continue your
17 deliberations. Shortly you're going to get some of the
18 documents that you requested earlier, and we are working on
19 getting all of them to you as soon as possible.

20 (Jury not present)

21 THE COURT: You may be seated.

22 So I will hear you, Mr. Meringolo, with respect to
23 your motion.

24 MR. MERINGOLO: We will rely on the papers, Judge.

25 THE COURT: Okay.

M63VSHET

1 So I'll hear the government's response.

2 MR. SOBELMAN: Yes, your Honor.

3 I have a few notes on my phone. I'm not communicating
4 with others.

5 Defense counsel cites no authority in his letter that
6 supports declaring a mistrial at this point in the trial.
7 There's no case that he cites that says if the jurors
8 inadvertently or even purposely divulge some type of
9 information about the substance of their deliberations, that a
10 mistrial should result. It's not that uncommon actually, in my
11 limited experience, for jurors to do that and for deliberations
12 to continue and be successful.

13 With respect to the argument about your Honor
14 questioning the juror that was questioned yesterday, there was
15 clearly a predicate for it under the applicable case law based
16 on the note that the other 11 jurors had passed up that
17 referenced him not following his oath, misconstruing the
18 Court's legal instructions, refusing to deliberate.

19 It's the precise situation that occurred in a number
20 of those other cases, including *Spruill*. And your Honor
21 conducted a very limited, targeted, and careful colloquy with
22 that juror that clearly did not delve into the juror's views,
23 the merits of his views, the substance of the deliberations. I
24 think three or four yes-or-no questions that are very similar
25 to the questions, if not identical to the ones that were asked

M63VSHET

1 during the voir dire process. That colloquy offers nothing for
2 the defense to rest on here.

3 The modified *Allen* charge that the Court gave included
4 exactly the language that's been approved by many courts with
5 respect to these matters where it's balanced. It tells the
6 jurors that they should reexamine their own views and listen to
7 those of others, but also the balanced language that the
8 defense had suggested to the Court about not giving up any
9 conscientiously held beliefs. So there's nothing in the *Allen*
10 charge that had any prejudicial effect or potential prejudicial
11 effect.

12 With respect to the defense's argument about some type
13 of unfair coercion, the defense engages in a fair amount of
14 speculation both in court before and in their motion about the
15 status of deliberations at various times based in part on the
16 note, the sort of lengthier note we received, the list of items
17 about a particular juror.

18 What we know now is the jurors are continuing to
19 deliberate; they are continuing to ask for evidence. And
20 nothing that the Court has done – whether it be the modified
21 *Allen* charge or very limited targeted questioning of one juror
22 – has been unduly coercive in any way. In fact, we are many
23 hours from that limited questioning and the jury is still
24 deliberating. It doesn't appear anyone was coerced into
25 changing their view. They still have not reached a verdict,

M63VSHET

1 and may or may not at some point.

2 Lastly, I think there was a reference to some type of
3 media attention on this particular juror. The Court has given
4 the jurors very clear instructions: If someone contacts them
5 about the case or approaches them, they should report it to the
6 Court. We assume – because the Court has not told us that
7 that's occurred – it has not occurred. And the Court also gave
8 repeated and clear instructions that the jurors should not be
9 reading or consuming any media or social media about the case.
10 And, again, we have no reason to think that any juror has done
11 so.

12 So I think the defense arguments are meritless. The
13 jurors should be able to continue their deliberations. We
14 should continue responding to their inquiries, and they'll take
15 as long as they need to take to reach a just verdict.

16 THE COURT: The application is denied.

17 I'll let you know if I get another note.

18 MR. SOBELMAN: Thank you, your Honor.

19 (Recess pending verdict)

20 THE COURT: Good afternoon. Please be seated.

21 I understand, Mr. Meringolo, did you want to raise a
22 question concerning bank records?

23 MR. MERINGOLO: Yes, your Honor.

24 In Exhibit 2000, which is the exhibits for the bank
25 records, I don't know if you remember the thing that I read to

M63VSHET

1 them that was in the bank records, the interview with Mr. Shea.

2 THE COURT: Yes.

3 MR. MERINGOLO: The government opposes that going in.
4 But it's part of the exhibit and we respectfully want it to go
5 in.

6 THE COURT: On the grounds of hearsay? What's the
7 ground?

8 MR. MERINGOLO: It's in evidence.

9 MR. SOBELMAN: No, your Honor.

10 THE COURT: I'm saying why are you objecting?

11 MR. SOBELMAN: Understood, your Honor.

12 It's not just that document; there are other documents
13 they ask also to go back. They fit in the same category. The
14 note as your Honor read it, I don't have a copy, but said they
15 want all bank statements.

16 THE COURT: Yes.

17 MR. SOBELMAN: That's what we printed, bank
18 statements. These documents are other documents that are
19 contained within the larger universe of bank records that were
20 offered; they are not bank statements. We think that's the end
21 of the analysis.

22 THE COURT: My understanding of the word "statement"
23 is a record of the activity within a bank account. And so if
24 you have a different definition --

25 MR. SOBELMAN: And, your Honor, just to be clear, all

M63VSHET

1 of the records are available to them electronically. They have
2 the portion that the defense wishes to go back now in hard copy
3 already electronically.

4 MR. MERINGOLO: Your Honor, it's based on the
5 statements itself, because that's the reason why they
6 interviewed him.

7 THE COURT: Okay. So let me just go back to the note.

8 It says here -- I'm now looking at Court Exhibit No.
9 4. It says: We the jury request a printout of all bank
10 statements from 2018 to 2020. So if something is not
11 concerning what goes in and what goes out of an account, what
12 does it concern, Mr. Meringolo?

13 MR. MERINGOLO: Well, this was an interview based on
14 what goes in and out.

15 THE COURT: What interview?

16 MR. MERINGOLO: The interview of the bank and Mr. --

17 THE COURT: Oh, you mean that --

18 MR. MERINGOLO: Yes.

19 THE COURT: -- that chat that they had in that grid.

20 That's not a statement of an account. That certainly
21 relates to the banking that Mr. Shea was doing, but it's not a
22 bank statement.

23 MR. MERINGOLO: Okay.

24 THE COURT: All right, then. That's my ruling.

25 Thank you.

M63VSHET

(Recess pending verdict)

THE COURT: Good afternoon, everyone.

Is there anything that you'd like to discuss before I have the jurors brought in?

MR. SOBELMAN: Not from the government, your Honor.

MR. MERINGOLO: Nothing from the defense, Judge.

THE COURT: All right.

Then please have our jurors brought in.

(Jury present)

THE COURT: Do the parties agree that all jurors are present and properly seated?

MR. SOBELMAN: Yes, your Honor.

MR. MERINGOLO: Yes, Judge.

THE COURT: Members of the jury, I know that you've been working very hard. Thank you. We've come to the end of the day and the end of the week. You are obligated to return on Monday at 9 a.m. on time. It's not optional; jury service is, of course, obligatory under the law.

I want to remind you that you are to stop your deliberations, and you will not be resuming deliberations until Monday morning, when the foreperson declares that deliberations are recommencing. Remember that you are not allowed to discuss the case amongst yourselves or with anyone else. Don't permit anyone to discuss the case in your presence until the foreperson declares that it's time to start deliberating with

M63VSHET

1 everyone in the jury room.

2 I wish everyone a wonderful weekend.

3 And remember, of course, not to listen to or read
4 anything about the case, be it a news media or any other form.

5 (Jury not present)

6 THE COURT: You may be seated.

7 So we will resume on Monday.

8 I'll let you know if I receive a note.

9 Have a good weekend.

10 (Adjourned to June 6, 2022 at 9 o'clock a.m.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25